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No. 02-61

IN THE

Supreme Court of the United States

JIANGSU SOPO CORPORATION (GROUP) LTD.,
Petitioner,

v.

BP CHEMICALS LTD., an English Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SALEM M. KATSH *
JACULIN AARON
STEPHEN J. MARZEN
TAMARA L. HRIVNAK
SHEARMAN & STERLING
599 Lexington Avenue
New York, NY 10022-6069
(212) 848-4000

* Counsel of Record

Counsel for the Petitioner

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INTRODUCTION

Sopo's Petition demonstrates that at least the Second (*Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari*, 12 F.3d 317 (2d Cir. 1993)), Third (*Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993)), and Fifth (*Aldy ex rel. Aldy v. Valmet Paper Mach.*, 74 F.3d 72 (5th Cir. 1996)) Circuits clearly follow the "gravamen" test, and their decisions are manifestly consistent with *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). BP's opposition discusses these decisions and agrees with Sopo that the decisions apply a "gravamen" or "foundation" test

and are consistent with *Nelson*. (BP Opp. at 10.) The dispute is thus over the court of appeals' decision below and the decisions of the Ninth Circuit on which it was based.

BP argues that there is no split in the circuits because the decision below complies with this Court's ruling in *Nelson*. However, when the court of appeals' stated "one element" rationale is considered in view of *Nelson's* reasoning and specific holding—that the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 et seq. (2002) commercial activity exception denies immunity only to such actions whose "gravamen" consists of commercial activity carried on by the foreign state in the United States—the substantive disparity between the decisions is obvious. BP admits that the court of appeals' decision follows the rationale of two "one element" decisions of the Ninth Circuit. (BP Opp. at 10-11.) Thus, if the decision below is inconsistent with *Nelson*, we have, by BP's own implicit admission, the very split in the circuits (the Ninth and Eighth Circuits as against at least three other circuits) that Sopo's Petition urges as grounds for this Court's review.

BP's essential argument in opposition is that "the real question presented by Sopo is whether a court must utter magic words such as 'gravamen' or 'foundation' somewhere in its opinion." (BP Opp. at 14.) This suggestion is absurd. The question presented is whether the courts are following the intent of Congress that a uniform standard be applied in deciding the delicate issue of sovereign immunity. There is no question that there is a real dichotomy in how the circuits have been dealing with this issue.

ARGUMENT

Despite urging that "[t]he court of appeals' decision in this case represents a straightforward and unremarkable application of settled FSIA law" (BP Opp. at 14), BP's opposition

does not quote or even refer to the actual reasoning of the court below, which was as follows:

> The FSIA contains no definition of "based upon," so we must accord that phrase its plain and ordinary meaning in interpreting the statute. *Nelson*, 507 U.S. at 357, 113 S.Ct. 1471. "[A] claim is 'based upon' events in the United States if those events establish a legal element of the claim. . . . An action is based upon the elements that prove the claim, no more and no less. If *one of those elements* consists of commercial activity within the United States or other conduct specified in the Act, this country's courts have jurisdiction." *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) (cited approvingly on this point in *Nelson*, *supra*). *We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States.*" "The entire case need not be based on the commercial activity of the defendant." *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000).

(App. at 6a (emphases added).)

There is nothing straightforward or unremarkable about this holding. Unless read carefully, one might conclude that the court of appeals is quoting from *Nelson*. It is not. As discussed in Sopo's Petition (*see* Petition at 9-10), the court of appeals is quoting from a pre-*Nelson* decision, *Santos*, 934 F.2d at 893. Thus, without quoting *Nelson* itself, the court below suggested that *Santos*' "one element" language was "cited approvingly" by *Nelson*. This is incorrect. The key language of *Nelson*, not quoted or discussed by either the court below or BP (which also fails to discuss or even cite *Santos*), stated as follows:

> the phrase ["based upon"] is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case. *See Callejo v. Bancomer, S. A.*, 764 F.2d 1101, 1109 (5th

> Cir. 1985) (focus should be on the "gravamen of the complaint"); *accord*, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) ("An action is based upon the elements that prove the claim, no more and no less.")

(*Nelson*, 507 U.S. at 357).

That is what this Court said. The court below purported to put words in this Court's mouth that were not uttered—to assert that this Court had cited *Santos* "approvingly on *[Santos' "one element"] point.*" (App. at 6a (emphasis added).)

The aspect of the court of appeals decision that BP does emphasize simply underscores why the tests of "gravamen" and "one element" are different, and why the split among the circuits is substantive. BP points out the unremarkable statement by the court of appeals that the Missouri Uniform Trade Secrets Act ("MUTSA"), Mo. Rev. Stat. § 417.453 (2002) "defines misappropriation to take two forms"—wrongful acquisition and wrongful disclosure. (App. at 7a (cited in BP Opp. at 14).) BP stresses that it chose to assert a "wrongful disclosure claim" (BP Opp. at 7), that "disclosure" is "one element" of that claim (BP Opp. at 8 (citing App. at 9a-10a)) and, therefore, the court of appeals was correct in holding that, if the disclosure is alleged to have been carried out in the United States, FSIA immunity has been overcome, at least for pleading purposes.

And here we come to heart of the matter. For, while the term "gravamen" has a long history and well-understood legal usage, the term "one element" invites a court, disposed to find jurisdiction, to ignore the core or essence, i.e., the "gravamen", of the plaintiff's claim, and to focus instead on some aspect of the claim involving U.S. activity. Here, for example, it cannot be gainsaid that the act of "disclosure" is "one element" of BP's claim. But it is equally clear that this element is not the essence of BP's claim of "*wrongful*

disclosure," a claim primarily founded upon events allegedly giving rise to a duty of non-disclosure, events which in this case took place in Asia. (Petition at 17.)

The "gravamen" test provides precisely the instructional power that the "one element" test lacks. In the case at bar, the "gravamen" test would force a court, as it did the district court, to look beyond some act of disclosure *per se*, to those events that would turn such an otherwise innocent act into a tort. BP is wrong when it asserts that "[a] critical flaw in the district court's analysis was its assumption that BP Chemicals could not state a separate claim for trade secret misappropriation based on SOPO's disclosures to U.S. vendors." (BP Opp. at 5.) BP has not advanced a claim "based upon" the "disclosure" of alleged BP trade secrets. It has made a claim based upon the "*wrongful* disclosure" of such materials.

The court of appeals itself recognized that the disclosure of trade secrets, *per se*, is not tortious, in stating that BP's "claim requires BP to prove Sopo disclosed BP's trade secrets to others without consent, *while having reason to know the trade secrets were acquired under circumstances giving rise to a duty to maintain their secrecy. See* Mo. Rev. Stat. § 417.453(2)(b)(c)." (App. at 9a.) BP knows that this italicized statement is fatal to its argument that a claim for *wrongful* disclosure can be said to be "based upon" the mere allegation that "Sopo disclosed BP's trade secrets to others". Unable to argue around the italicized statement by the court of appeals of BP's claim, which emphasizes the events necessary to make otherwise innocuous disclosures tortious, BP resorts to "ellipsing" the *entire sentence* out of the paragraph from the court of appeals' opinion, which it otherwise quotes in full. (BP Opp. at 7-8.)

The issue of standards is thus hardly a matter of uttering "magic words". Both the district court and court of appeals put the lie to BP's cavalier assertion that "[t]he result would have been the same whether one applied a 'one element' test

or a 'gravamen' test." (BP Opp. at 8.) Each court, *after* announcing the standard it had decided to apply ("gravamen" and "one element," respectively), then stated that deciding the case posed "little difficulty." (App. at 10a, 26a.)

Certainly the United States, in urging this Court to overturn the decision by the Eleventh Circuit in *Nelson* and adopt a "gravamen" test, did not regard the issue of standards as a matter of choosing "magic words". The United States urged a "gravamen" test because it provides real legal guidance, while the "one element" test is an invitation to the application of virtually unbounded discretion. As if to underscore its own recognition that it is not simply following a well-settled rule, the court of appeals, in the critical paragraph of its opinion (*see supra*, p. 2) added the following otherwise gratuitous sentence: "*We emphasize that only one element of a plaintiff's claim must concern commercial activity carried on in the United States.*" (App. at 6a (emphasis added).)

It being clear that the dichotomy of results reached by the district court and court of appeals is a direct function of the disparate standards they applied, BP's effort to dispel the significance of the admitted split in standards among the circuits is futile. In the key paragraph setting forth its holding and reasoning (*see supra*, p. 2), the circuit court decisions cited by BP are the Seventh Circuit's pre-*Nelson* "one element" decision in *Santos*, and the Ninth Circuit's "an element" decision in *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir.), *cert denied*, 531 U.S. 979 (2000), which was based upon a prior Ninth Circuit case, *Sugimoto v. Exportadora De Sal, S.A. De C.V.*, 19 F.3d 1309 (9th Cir. 1994).

The pre-*Nelson Santos* case merits no further discussion. *See supra*, p. 2-3. As for the Ninth Circuit decisions, they perfectly illustrate, as does the decision below, both the existence and substantive nature of the split among the circuits.

BP cannot and does not attempt to deny the self-evident fact that both *Sun* and *Sugimoto* apply an "an element" test. *Sugimoto* simply miscited *Nelson*, stating that "[a]ccording to *Saudi Arabia*, an action is based on commercial activity in the United States if *an element* of the plaintiff's claim consists . . . [of] commercial activity carried on in the United States." *Sugimoto*, 19 F.3d at 1311 (citing *Nelson*, 507 U.S. at 355-56). Obviously, that is not what *Nelson* stated. Whether the Ninth Circuit in *Sugimoto* felt that a proper analysis under *Nelson* would lead to a result the court subjectively felt would be wrong, or for other reasons, its "an element" language was clearly unauthorized. Its holding was subsequently picked up and relied upon in *Sun*. *Sun*, cited and relied upon by the court of appeals (*see supra*, p. 2), affords another graphic example of how a "one element" or "an element" standard leads to results inconsistent with a "gravamen" test, and how it invites claim manipulation of the type this Court in *Nelson* expressly condemned.[1]

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[1] The United States and this Court's decision in *Nelson* were concerned about the ability of plaintiffs to gerrymander claim language so as to make it appear that a claim bore a substantial relationship to the United States when in fact it was based upon non-U.S. commercial activities. In addition to the other problems apparent in the court of appeals' opinion, it held that this Court's reference to "semantic ploys" was reserved for claims, such as, in its view, the claim in *Nelson*, that were "absurd" on the face of the pleading. (App. at 11a.) How the court reached this conclusion is difficult to discern. There is nothing in the *Nelson* Court's majority opinion suggesting this interpretation. *See Nelson*, 507 U.S. at 363. And, certainly, it was not the view of two of the three judges on the Eleventh Circuit, who voted to uphold the Nelsons' claim. And, likewise, it was not what the dissenters in this Court's *Nelson* decision believed. This Court's "semantic ploy" warning had to do with clever pleading that would mislead a court into a decision that substituted form for substance—precisely the gambit that BP attempted, unsuccessfully in the district court and successfully in the court of appeals. When added to its redaction of this Court's definition of "based upon", the court of appeals'

The Suns originally sued Taiwan for negligent supervision in the drowning death of their son on a beach in Taiwan while on a trip organized by the Taiwanese government. Because the district court, in that case, found no subject matter jurisdiction since *no element* of the Suns' claim consisted of conduct occurring in the United States, the Suns modified their claim to one for negligent misrepresentation, arguing that Taiwan's failure to disclose, in the United States, the dangers of participating in the beach trip, was tortious. Under *Nelson*, the "gravamen" of this refashioned claim would clearly still be Taiwan's failure adequately to supervise the Suns' child, and the negligent misrepresentation claim would be recognized, as was the failure to warn claim in *Nelson*, as a semantic ploy to achieve jurisdiction. The *Sun* court quoted *Sugimoto* as if it, rather than this Court, had defined the meaning of "based upon" in the FSIA. Like the court of appeals, the Ninth Circuit went out of its way to "emphas[ize]" an "an element" standard. *Sun*, 201 F.3d at 1109.[2]

In sum, the court of appeals *chose* to follow the Ninth Circuit's "an element" interpretation of *Nelson*, as well as the pre-*Nelson* "one element" language of the Seventh Circuit in *Santos*. It is more than axiomatic, however, that the courts of appeal are denied the luxury of choice once this Court has spoken. The rest of the circuits that have confronted this

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extraordinary interpretation of this Court's "semantic ploy" warning amounts, effectively, to a renunciation of *Nelson* in all respects.

[2] The *Sun* court allowed the plaintiffs to recast their claim, distinguishing *Nelson* on the ground that "[t]he Suns' point is not that tour organizers have a duty to warn of their negligent acts, but rather that there is a duty to take reasonable care in arranging a tour itinerary." *Sun*, 201 F.3d at 1110. Plainly, this is a distinction without a difference and flies in the face of this Court's "semantic ploy" admonition in *Nelson*—that "To give jurisdictional significance to [such a] feint of language would effectively thwart the Act's manifest purpose." *Nelson*, 507 U.S. at 363.

question have fallen into line with *Nelson*, whether they like it or not. The FSIA represents critical federal policy affecting the country's foreign relations. It is an area Congress meant to subject to uniform standards and as to which this Court affirmed uniform standards. They should be followed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SALEM M. K[illegible]TSH *
JACULIN AARON
STEPHEN J. MARZEN
TAMARA L. HRIVNAK
SHEARMAN & STERLING
599 Lexington Avenue
New York, NY 10022-6069
(212) 848-4000

* Counsel of Record

Counsel for the Petitioner

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